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No. 07-953

In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court abused its discretion in denying appellant's motion for a preliminary injunction against the enforcement of reporting and disclaimer requirements governing appellant's planned advertisements.

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OPINION BELOW

The opinion of the three-judge district court denying appellant's motion for a preliminary injunction (J.S. App. 2a-20a) is not yet reported.

JURISDICTION

The decision of the three-judge district court was issued on January 15, 2008. A notice of appeal was filed on January 16, 2008 (J.S. App. 20a-21a), and the jurisdictional statement was filed on January 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

In the district court, appellant argued, inter alia, that the reporting and disclaimer requirements imposed by Sections 201 and 311 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat.

88, 105 (2 U.S.C. 434(f)(2) (Supp. V 2005); 2 U.S.C. 441d(a) (2000 & Supp. V 2005)), are unconstitutional as applied to three of appellant's planned broadcast advertisements. The district court denied appellant's motion for a preliminary injunction against enforcement of those requirements pending the court's resolution of the case on the merits. J.S. App. 2a-20a. Appellant now seeks this Court's review of that denial of preliminary injunctive relief and has moved for expedited briefing and argument this spring.[1]

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[1] The question whether this Court has jurisdiction over the instant appeal is not free from doubt. Under BCRA § 403(a)(1) and (3), 116 Stat. 114, suits challenging the constitutionality of any BCRA provision may be heard by a three-judge district court within the District of Columbia, and the three-judge court's "final decision" is reviewable by direct appeal to this Court. For suits filed on or before December 31, 2006, that three-judge court procedure was the exclusive mechanism for pursuing a constitutional challenge to BCRA. See BCRA § 403(d)(1), 116 Stat. 114; cf. *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-5292, 2004 WL 1946452 (D.C. Cir. Sept. 1, 2004). BCRA § 403(d)(2), 116 Stat. 114, states, however, that "[w]ith respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action." Appellant elected to have its suit heard by a three-judge district court. See J.S. App. 7a n.8.

Under 28 U.S.C. 1292(a)(1), the courts of appeals have jurisdiction to review "[i]nterlocutory orders of the district courts" granting or denying preliminary injunctive relief, "except where a direct review may be had in the Supreme Court." This Court has jurisdiction to review the denial of a preliminary injunction "in any civil action, suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. 1253 (emphasis added). This case was not "required" to be decided by a three-judge court insofar as appellant could have presented its constitutional claims to a single-judge court. On the other hand, under BCRA § 403(d)(2), appellant was entitled to a three-judge district court as of right, and once appellant elected that option, BCRA "required" that a three-judge

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(d); 2 U.S.C. 438(a)(8) (Supp. V 2005); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. Since 1910, federal law has required disclosure of information related to the financing of federal election campaigns. See *Buckley* v. *Valeo*, 424 U.S. 1, 61 (1976) (per curiam). After Congress enacted a new disclosure regime in 1974, see *id.* at 62-64, this Court held that the new provisions were constitutional on their face, *id.* at 64-84. The Court explained that disclosure serves the important government interests of (1) providing the electorate with information on campaign financing "in order to aid the voters in evaluating those who seek federal office," *id.* at 66-67; (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light

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court be convened to decide the case. That may be sufficient to trigger the application of Section 1253. If this Court were to determine that it lacks jurisdiction over the instant interlocutory appeal, the district court's "final decision" in the case would still be reviewable by this Court pursuant to BCRA § 403(a)(3), 116 Stat. 114, and the grant or denial of preliminary injunctions by three-judge district courts in cases in which the plaintiff elects a three-judge panel would be reviewable in the court of appeals (and in this Court via a petition for certiorari).

of publicity," *id.* at 67; and (3) "gathering the data necessary to detect violations of the contribution limitations" that were simultaneously enacted, *id.* at 68.

The disclosure requirements at issue in *Buckley* pertained to "the use of money or other objects of value 'for the purpose of . . . influencing'" nominations or elections to federal office. 424 U.S. at 77 (quoting 2 U.S.C. 431(f) (Supp. IV 1974)). In order to avoid "serious problems of vagueness," the Court held that, as applied to organizations whose major purpose was not campaign activity, the disclosure provisions would "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," *i.e.*, "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 76, 79-80 (footnote omitted). Consistent with earlier decisions regarding compelled disclosure, the Court held that the challenged provisions, so construed, would unconstitutionally infringe on associational rights only in the limited circumstance when such disclosure would result in a "reasonable probability" of "threats, harassment, or reprisals" against an organization or its members. *Id.* at 68, 74.

3. Based on its assessment of evolving federal campaign practices and abuses during the years following *Buckley*, Congress subsequently determined, inter alia, that entities had been funding broadcast advertisements designed to influence federal elections "while concealing their identities from the public," including by "hiding behind dubious and misleading names." *McConnell* v. *FEC*, 540 U.S. 93, 196-197 (2003) (quoting *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 237 (D.D.C.) (per curiam)). Through BCRA, Congress amended FECA to require disclosure about the sources of funding for "electioneer-

ing communication[s]." The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; and (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate. 2 U.S.C. 434(f)(3)(A)(i) (Supp. V 2005).

The disclosure provisions at issue in this case include both reporting requirements, 2 U.S.C. 434(f)(2) (Supp. V 2005); 11 C.F.R. 104.20, and disclaimer requirements, 2 U.S.C. 441d (Supp. V 2005); 11 C.F.R. 110.11.[2] The reporting provisions state that any "person" (defined to include any corporation, labor organization, or other group, 2 U.S.C. 431(11)) expending more than $10,000 to produce or air an electioneering communication must file a statement with the Commission. 2 U.S.C. 434(f)(1) (Supp. V 2005). The statement must identify the person making the disbursement, the amount and date of the disbursement, and, in the case of an electioneering communication made by a corporation, "the name and address of each person who made a donation aggregating $1,000 or more to the corporation * * * for the purpose of furthering electioneering communications." 11 C.F.R. 104.20(c); 72 Fed. Reg. 72,913 (2007) (to be codified at 11

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[2] The FEC recently amended its electioneering communication reporting regulations to conform to this Court's decision in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), and to address the reporting requirements for corporations and labor organizations. See *Electioneering Communications*, 72 Fed. Reg. 72,899, 72,913-72,915 (2007) (to be codified at 11 C.F.R. 104.20, 114.15 (2008)). Appellant's planned advertisements would be subject to the revised provisions that will be contained in 11 C.F.R. 104.20(c)(7)(ii) and (9) (2008). See 72 Fed. Reg. at 72,899 (providing that revised regulations became effective on publication date).

C.F.R. 104.20(c)(9) (2008)). If the disbursement is made out of a "segregated bank account established to pay for electioneering communications," the corporation making the electioneering communication need only identify those individuals who contributed $1000 or more to that segregated account. 2 U.S.C. 434(f)(2)(E) (Supp. V 2005); 72 Fed. Reg. at 72,913 (to be codified at 11 C.F.R. 104.20(c)(7) (2008)).

BCRA's disclaimer provisions require that a televised electioneering communication include on the screen (1) "the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication," and (2) a statement "that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. 441d(a)(3) (Supp. V 2005); 11 C.F.R. 110.11(b)(3). The communication must also include a statement that the entity funding the communication "is responsible for the content of this advertising," and that statement must be (1) made orally by a representative of the person making the communication, and (2) printed "for a period of at least 4 seconds" on at least four percent of the television screen. 2 U.S.C. 441d(d)(2) (Supp. V 2005); 11 C.F.R. 110.11(c)(4).

4. Soon after BCRA was enacted, appellant and other plaintiffs challenged the constitutionality of numerous BCRA provisions on their face, including the reporting and disclaimer requirements that are at issue in this appeal. In *McConnell*, this Court rejected the plaintiffs' facial challenges to those disclosure provisions. See 540 U.S. at 194-202, 230-231.

In upholding the reporting requirements applicable to "electioneering communications," the Court in *McConnell* explained that "the important state interests

that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA." 540 U.S. at 196. For that reason, the Court concluded, "*Buckley* amply supports application of [the] disclosure requirements to the entire range of 'electioneering communications.'" *Ibid.* The Court also endorsed the conclusion of the district court in that case that the plaintiffs' challenge to BCRA's reporting requirements "ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.* at 197 (quoting *McConnell*, 251 F. Supp. 2d at 241). Three other Justices in *McConnell*, while rejecting much of the Court's reasoning, agreed that BCRA's reporting requirements are generally constitutional because they "substantially relate" to the informational interest identified in the Court's opinion. See *id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part); see *id.* at 286 & n.*.

Consistent with *Buckley*, the Court in *McConnell* recognized that, under certain limited circumstances, "compelled disclosures may impose an unconstitutional burden on the freedom to associate in support of a particular cause." 540 U.S. at 198. The Court explained that, under the governing standard, disclosure may not be required in circumstances where there is a "reasonable probability" that such disclosure "would subject identified persons to 'threats, harassments, and reprisals.'" *Id.* at 198-199 (quoting *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982)). The Court agreed with the district court that the evidence in

McConnell had "not establish[ed] the requisite 'reasonable probability' of harm to any plaintiff group or its members," but the Court noted that its rejection of the facial challenge to the reporting requirements did "not foreclose possible future challenges to particular applications of that requirement." *Id.* at 199.

The Court in *McConnell* also upheld BCRA's disclaimer requirements. 540 U.S. at 230-231. Chief Justice Rehnquist, writing for eight Members of the Court (see *id.* at 224 & n.*), explained that BCRA's "inclusion of electioneering communications in the [pre-existing disclaimer] regime bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." *Id.* at 231 (quoting *Buckley*, 424 U.S. at 81).

5. In *McConnell*, this Court rejected a facial challenge to BCRA § 203, 116 Stat. 91 (2 U.S.C. 441b(b)(2) (Supp. V 2005)), which prohibits corporations or labor unions from using general treasury funds to pay for electioneering communications. 540 U.S. at 204-206. Four years later, in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL*), the Court sustained an as-applied challenge to that prohibition. Two Members of the Court framed the relevant inquiry as whether the advertisements at issue constituted "express advocacy or its functional equivalent." *Id.* at 2664 (opinion of Roberts, C.J.). Under their approach, "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. Those two Members concluded that, "[u]nder this test, WRTL's three ads are plainly not the functional equivalent of express advocacy." *Ibid.* Three other Justices concluded that BCRA § 203 is un-

constitutional on its face and would have overruled the Court's contrary holding in *McConnell*. *Id.* at 2684-2687 (Scalia, J., concurring in part and concurring in the judgment).

6. Appellant Citizens United is a nonprofit Virginia corporation with tax-exempt status under 26 U.S.C. 501(c)(4). J.S. App. 3a. Appellant has produced a film about Senator Hillary Clinton entitled "Hillary: The Movie," which appellant intends to distribute through theaters, video on-demand broadcasts, and DVD sales. *Ibid.* Appellant has planned since at least January 2007 to distribute that film "in all of the early [presidential] primary states." *Hannity & Colmes: Analysis with Dick Morris* (Fox News television broadcast Jan. 22, 2007), 2007 WLNR 1299920. Appellant has also produced three television advertisements for the movie. J.S. App. 3a-5a & nn.2-4.

In December 2007, appellant filed suit in federal district court, challenging BCRA's application to both the film and the proposed advertisements. See J.S. App. 7a-8a. With respect to the film itself, appellant contended that BCRA § 203's ban on the use of general treasury funds for "electioneering communications" is unconstitutional on its face and as applied to "Hillary: The Movie." See *id.* at 8a, 10a-11a. With respect to the advertisements for the film, the FEC conceded in the district court that, under this Court's decision in *WRTL*, appellant could not constitutionally be foreclosed from financing those advertisements with general treasury funds. See *id.* at 14a. The parties disagreed, however, on the question whether BCRA's reporting and disclaimer provisions were constitutional as applied to the advertisements. See *id.* at 8a, 14a.

7. The three-judge district court denied appellant's request for preliminary injunctive relief on both of appellant's claims. J.S. App. 2a-20a.

a. The district court held that appellant had no substantial likelihood of prevailing on its as-applied challenge with respect to the film itself because the film is the functional equivalent of express advocacy. J.S. App. 9a-14a. The court stated that the film "is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." *Id.* at 11a. The jurisdictional statement does not challenge the district court's denial of preliminary injunctive relief with respect to the movie.

b. The district court held that appellant had also failed to establish the requisite likelihood of success at this stage on its contention that BCRA's reporting and disclaimer provisions are unconstitutional as applied to appellant's proposed advertisements. J.S. App. 14a-17a. The court explained that this Court in *McConnell* had upheld those provisions "for the 'entire range of electioneering communications' set forth in the statute." *Id.* at 15a (quoting *McConnell*, 540 U.S. at 196). The court rejected appellant's contention that this aspect of *McConnell* had been superseded by *WRTL*, stating that "[t]he only issue in [*WRTL*] was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period." *Ibid.* The district court also observed that, in various contexts, this Court "has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." *Id.* at 16a.

The district court recognized that this Court in *McConnell* had "suggest[ed] one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals and thus 'impose an unconstitutional burden on the freedom to associate in support of a particular cause.'" J.S. App. 17a (quoting *McConnell*, 540 U.S. at 198). The court explained, however, that while appellant's "memorandum in support of its motion [for a preliminary injunction] states that there may be reprisals," appellant had "presented no evidence to back up this bald assertion." *Ibid.* The court observed that appellant "is thus in a similar position as the parties in *McConnell* who made the same assertion but presented no specific evidentiary support." *Ibid.*

ARGUMENT

The district court correctly denied appellant's motion for preliminary injunctive relief, and the court's decision rests on a straightforward application of settled legal principles. The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

1. In determining whether to issue a preliminary injunction, a district court considers the plaintiff's likelihood of success on the merits, whether the plaintiff will suffer irreparable injury in the absence of an injunction, the prospect of injury to other parties if an injunction is entered, and the public interest in granting or withholding temporary relief. J.S. App. 8a; see *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). This Court reviews the district court's application of the preliminary-injunction factors under an abuse-of-discretion standard. See *id.* at 931-932; see also *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428 (2006).

In denying appellant's request for preliminary injunctive relief, the district court relied principally on its determination that appellant had failed to show a substantial likelihood of success on the merits. See J.S. App. 17a-18a. That holding is correct and provides a fully sufficient basis for the district court's ruling.

In contending that the district court abused its discretion by denying preliminary injunctive relief against enforcement of BCRA's reporting and disclaimer requirements, appellant bears a particularly heavy burden. Appellant's effort to alter the status quo by seeking an exemption from BCRA's coverage is contrary to the established principle that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). In addition, this Court's holding in *McConnell* that the challenged reporting and disclaimer provisions are constitutional on their face at a minimum strengthens "[t]he presumption of constitutionality which attaches to every Act of Congress." *Walters* v. *National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). As Chief Justice Rehnquist explained, "[a]n injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held BCRA facially constitutional." *Wisconsin Right to Life, Inc.* v. *FEC*, 542 U.S. 1305, 1305-1306 (2004) (in chambers) (citing *McConnell*, 540 U.S. at 189-210).[3]

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[3] In addition, appellant's claim that it will suffer irreparable harm in the absence of preliminary injunctive relief is called into question by the fact that appellant has planned since at least January 2007 to distribute *Hillary: The Movie* (see p. 9, *supra*), but waited until December 2007

2. In *McConnell*, eight Members of this Court—including three Justices who would have held BCRA § 203's prohibition on the use of corporate treasury funds for "electioneering communications" to be unconstitutional on its face—agreed that the reporting and disclaimer requirements applicable to such communications are facially valid. See pp. 6-7, *supra*. In particular, the opinion for the Court stated that "*Buckley* amply supports application of [FECA's] disclosure requirements to the entire range of 'electioneering communications.'" 540 U.S. at 196. That holding controls this case.

Contrary to appellant's suggestion (J.S. 17), the government does not contend that *McConnell* "precludes future as-applied challenges" to BCRA's reporting and disclaimer requirements. The Court in *McConnell* made clear that as-applied challenges *are* available, stating that the Court's "rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement." 540 U.S. at 199. The Court further explained that, to succeed in such an as-applied challenge, a plaintiff must demonstrate a "reasonable probability" that the forced disclosures "would subject identified persons to 'threats, harassment, and reprisals.'" *Id.* at 198-199 (quoting *Brown*, 459 U.S. at 100). See Appellee's Br. at 25 n.7, *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (No. 04-1581) (identifying, inter alia, this type of as-applied challenge to the BCRA disclosure requirements as one left open in *McConnell*). The *McConnell* Court observed that, al-

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to file its current suit. Although appellant suggests (J.S. 2-3) that it deferred filing suit until the completion of a recent FEC rulemaking (see note 2, *supra*), appellant did not participate in the rulemaking itself.

though some plaintiffs in that case had expressed concern that disclosure might lead to such harms, no plaintiff had made a sufficient evidentiary showing that those injuries were actually likely to occur. 540 U.S. at 199.

Similarly in the instant case, the district court did not read *McConnell* as foreclosing all as-applied challenges to BCRA's reporting and disclaimer requirements. To the contrary, the district court specifically noted that "[t]he *McConnell* Court did suggest one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals." J.S. App. 17a. The district court concluded, however, that appellant could not prevail in such an as-applied challenge because appellant (like the plaintiffs in *McConnell*) had raised the possibility of reprisals but had offered no evidence to support that concern. *Ibid.*[4] Similarly in this Court, appellant suggests in passing (J.S. 12) that its donors "may * * * be subject to various forms of retaliation by political opponents," but it identifies no evidence supporting that assertion, let alone any basis for concluding that the

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[4] Appellant cites *Buckley*, 424 U.S. at 64, for the proposition that the prospect of reprisals is "inherent in compelled disclosure." J.S. 12. The Court in *Buckley* noted that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64. Read as a whole, however, *Buckley* and subsequent decisions make clear that, while compelled disclosure inherently creates some risk of reprisal and may under some circumstances effect an unconstitutional burden on speech and associational rights, the likelihood of such a burden cannot be presumed but must be proved through particularized evidence. See *McConnell*, 540 U.S. at 197-199 (summarizing Court's decisions).

district court's assessment of the record reflected an abuse of discretion.[5]

In arguing that BCRA's reporting and disclaimer provisions are unconstitutional as applied to its own advertisements, appellant makes no meaningful effort to satisfy the prerequisites for the type of as-applied challenge that the Court in *McConnell* specifically approved. Rather, appellant contends that it may not constitutionally be subjected to the reporting and disclaimer requirements because its advertisements, while concededly "electioneering communication[s]" within the meaning of BCRA, are not the "functional equivalent" of express advocacy under the lead opinion in *WRTL*. J.S. 20-22, 24. The *McConnell* Court's statement that BCRA's reporting requirements may constitutionally be applied "to the entire range of 'electioneering communications,'" 540 U.S. at 196, *combined with* the Court's express recognition that those requirements are subject

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[5] Appellant has maintained a separate segregated fund (commonly referred to as a "PAC") for more than 13 years and has disclosed the names and addresses of its donors pursuant to federal law. See Citizens United Political Victory Fund, *Statement of Organization* (June 15, 1994) <http://query.nictusa.com/cgi-bin/fecimg/?94039043287+0>; FEC, *Citizens United Political Victory Fund* (visited Feb. 12, 2008) <http://query.nictusa.com/cgi-bin/fecimg/?C00295527> (disclosure database report). During that time, appellant has disclosed approximately 1000 contributions from individuals in amounts of $200 or more, including address and employer information for most of the individuals. FEC, *Individuals Who Gave to this Committee: Citizens United Political Victory Fund* (visited Feb. 12, 2008) <http://query.nictusa.com/cgi-bin/com_ind/C00295527/> (disclosure database report). Appellant's inability to produce any evidence of actual reprisals is particularly striking in light of the large volume of donor information that it has previously released. In addition, appellant was one of the plaintiffs in *McConnell*, yet it failed in that case as in this one to present evidence that disclosure of its donors would likely lead to retaliation.

to a *different sort* of as-applied challenge, *id.* at 199, strongly suggests that the Court did not contemplate as-applied challenges based solely on the content of the relevant communication.

3. In all events, appellant's as-applied challenge plainly lacks merit. The principal thrust of appellant's argument is that, because *WRTL* precludes the application of BCRA § 203's treasury-financing ban to appellant's advertisements, application of BCRA's reporting and disclaimer provisions is necessarily barred as well. J.S. 24. That argument rests on the premise that the authority of Congress and state legislatures to require disclosure of financing sources is no greater than its authority to bar the use of corporate treasury funds to pay for particular communications. This Court has repeatedly rejected that proposition.[6]

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), for example, this Court held that the defendant corporation was constitutionally entitled to use its general treasury funds to engage in express advocacy of federal electoral outcomes, notwithstanding the ban imposed by 2 U.S.C. 441b on use of corporate treasury funds for that purpose. 479 U.S. at

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[6] The plaintiff in *WRTL* did not link BCRA's treasury-financing and disclosure requirements in the manner that appellant now advocates, but instead affirmatively disavowed any challenge to BCRA's reporting and disclaimer provisions. WRTL's brief in this Court explained: "Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimers and public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue." Appellee's Br. at 49, *WRTL*, *supra* (Nos. 06-969 & 06-970).

263-264. The Court explained that, given the particular characteristics of the corporation involved, the corporation's campaign-related spending would not pose the danger at which Section 441b was directed. See *ibid.* The Court made clear, however, that the corporation remained subject to the applicable FECA disclosure requirements (but not, of course, to the additional requirements applicable to separate segregated funds). See *id.* at 262 (explaining that "MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures").

The Court has taken a similar approach to corporate spending in the context of ballot initiatives. In *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), this Court struck down a Massachusetts law that prohibited banks and business corporations from making certain expenditures for the purpose of influencing the outcome of public referenda. *Id.* at 767-768, 786-795. In holding that the plaintiff corporation had a First Amendment right to engage in such advocacy, the Court specifically contrasted public referenda from "the quite different context of participation in a political campaign for election to public office." *Id.* at 788 n.26. The Court observed, however, that even in the context of corporate expenditures on referenda, which could not constitutionally be prohibited, "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. The

Court's subsequent decisions have continued to recognize that, while advocacy of particular referendum outcomes is entitled to full constitutional protection, persons who engage in such advocacy may be required to identify the sources of their funding. See *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 202-203, 205 (1999); *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 294 n.4, 298-299 (1981).

This Court has also held that "those who for hire attempt to influence legislation" may be required to disclose the sources and amounts of the funds they receive to undertake lobbying activities. *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954). The Court explained that, if Congress could not mandate the provision of that information, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* at 625. In *Bellotti*, this Court indicated that "the First Amendment protects the right of corporations to petition legislative and administrative bodies," 435 U.S. at 792 n.31, but cited *Harriss* with approval as support for the proposition that compelled disclosure of financing information is permissible, *id.* at 792 n.32. The Court has thus repeatedly recognized that legislatures may require the disclosure of information concerning the source of funds used to influence public policy, even when that influence itself cannot be constitutionally prohibited, and indeed even when it occurs outside the election context.

Appellant relies on the *Buckley* Court's determination that a prior FECA disclosure provision was limited to "spending that is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80; see J.S. 1-2, 18-22. That reliance is misplaced. The

Court in *Buckley* announced the express advocacy test (for which the reference to "unambiguously campaign related" spending, 424 U.S. at 81, was shorthand) as a *construction* of the statutory phrase "for the purpose of . . . influencing [federal elections]." *Id.* at 78-81; see pp. 3-4, *supra*. This Court has since recognized that *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-192; see *WRTL*, 127 S. Ct. at 2670 n.7 (opinion of Roberts, C.J.). With respect to disclosure requirements in particular, this Court's precedents squarely refute appellant's contention that Congress's power is limited to communications that are "unambiguously related" to an identified federal candidate's campaign. The decisions discussed above make clear that compelled disclosure of financing information may be permissible even when the disbursements in question have *nothing* to do with any candidate election.[7]

4. Appellant contends (J.S. 13) that BCRA's disclaimer provisions "require[] [appellant] to mislead the

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[7] Appellant contends that, "[i]n addition to being protected issue advocacy," the advertisements at issue here are properly regarded as proposals for commercial transactions, such as box office sales or DVD purchases of "Hillary: The Movie." J.S. 11; see J.S. 10. To the extent that appellant's advertisements constitute commercial speech, however, they are if anything entitled to less rather than more constitutional protection. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562-563 (1980) ("The Constitution * * * accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."). The film that appellant seeks to promote, moreover, was found by the district court to be the functional equivalent of express advocacy, J.S. App. 9a-14a, and appellant has not challenged that determination in this Court.

public by identifying its speech as electioneering speech when it is not." That assertion is baseless. The challenged disclaimer provisions require that an "electioneering communication" broadcast on television must include a written statement on the screen that (a) identifies "the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication," (b) states "that the communication is not authorized by any candidate or candidate's committee," and (c) states that the entity funding the electioneering communication "is responsible for the content of this advertising." See 2 U.S.C. 441d(a)(3) and (d)(2) (Supp. V 2005); 11 C.F.R. 110.11(a)(4), (b)(3) and (c)(4)(iii). The disclaimer provisions further require that such an advertisement include an oral statement that the entity funding the electioneering communication "is responsible for the content of this advertising." See 2 U.S.C. 441d(d)(2) (Supp. V 2005); 11 C.F.R. 110.11(a)(4) and (c)(4)(i). Those provisions do not require appellant to characterize its advertisements as "electioneering" speech or anything else, but simply require appellant to take responsibility "for the content of this advertising."

Appellant further contends (J.S. 13) that the disclaimer requirements "deprive[] [appellant] of valuable time in its short and expensive broadcast Ads, which deprivation and burden is not justified by any constitutional or congressional authority." The required written disclaimer, however, may occupy as little as four percent of the vertical height of the television screen, see 11 C.F.R. 110.11(c)(4)(iii)(A), and the oral disclaimer would consist solely of the words "Citizens United is responsible for the content of this advertising," see 2 U.S.C. 441d(d)(2) (Supp. V 2005). Any burden those requirements may impose is not of constitutional dimension.

The disclaimer requirements serve to ensure that voters can properly assign responsibility for advertisements that refer to identified federal candidates during the run-up to elections—and, in particular, to prevent the *mis*attribution of such advertisements to the candidate or her opponent.

Eight Justices in *McConnell* agreed that BCRA's disclaimer provisions are valid as applied to "electioneering communications" generally. 540 U.S. at 230-231; see *id.* at 224 & n.*. This Court's intervening decision in *WRTL* provides no basis for concluding that the disclaimer provisions are unconstitutional as applied to appellant's own advertisements. The fact that appellant's advertisements are not *unambiguously* election-related—*i.e.*, the fact that they may reasonably be construed as something other than an appeal to vote against Hillary Clinton—does not eliminate the risk of voter confusion or misattribution that the disclaimer requirements are intended to address. Because any burden on appellant is minor, and the government's interest is substantial, appellant's as-applied challenge fails.

5. This Court has long recognized that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 U.S. at 42. Thus, even when a particular "electioneering communication" can "reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," *WRTL*, 127 S. Ct. at 2670 (opinion of Roberts, C.J.), and therefore is exempt under *WRTL* from BCRA § 203's ban on corporate treasury financing, the advertisement may still have a practical impact on candidate elections. The lead opinion in *WRTL* did not suggest that, unless a particular "electioneering commu-

nication" is the "functional equivalent" of express advocacy, its potential impact on candidate elections must be ignored altogether. Rather, the opinion analyzed BCRA § 203's treasury-financing ban as a form of "suppression" of corporate speech and concluded that "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent to an election." *Id.* at 2669.[8] The thrust of the opinion was that, if reasonable doubt exists as to whether a particular advertisement constitutes electoral advocacy, "the First Amendment requires [the Court] to err on the side of protecting political speech rather than suppressing it." *Id.* at 2659.

Application of BCRA's reporting and disclaimer requirements, by contrast, cannot plausibly be viewed as "suppression" of speech. To the contrary, enforcement of those requirements *increases* the range of information available to citizens and thereby furthers First Amendment values. See *McConnell*, 540 U.S. at 197 (explaining that "[p]laintiffs' argument for striking down BCRA's disclosure provisions * * * ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace") (quoting *McConnell*, 251 F. Supp. 2d at 237); *Buckley*, 424 U.S. at 82 (characterizing FECA disclosure requirements as "a minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view"). The core rationale of the lead opinion in *WRTL*—*i.e.*, that any ambiguity as to the character of particular advertisements must be resolved in a speech-protective

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[8] Justice Scalia's concurring opinion likewise rested on the view that BCRA § 203 "*bans* vast amounts of political advocacy." 127 S. Ct. at 2684 (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

manner—therefore does not support appellant's as-applied challenge to the very different BCRA provisions at issue here.

CONCLUSION

Assuming that appellate jurisdiction properly lies in this Court, cf. note 1, *supra*, the appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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